

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>QWEST CORPORATION and U.S. CELLULAR CORPORATION,</p> <p style="text-align:right">Complainants,</p> <p style="text-align:center">v.</p> <p>EAST BUCHANAN TELEPHONE COOPERATIVE,</p> <p style="text-align:right">Respondent.</p>	<p>DOCKET NOS. FCU-04-42, FCU-04-43</p>
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**ORDER CONTINUING TEMPORARY INJUNCTION,
DOCKETING AND CONSOLIDATING CASES,
AND SETTING PROCEDURAL SCHEDULE**

(Issued September 14, 2004)

On August 13, 2004, Qwest Corporation (Qwest) filed with the Utilities Board (Board) a "Complaint for Emergency Injunctive Relief" (the Complaint) naming East Buchanan Telephone Cooperative (EBTC) as respondent. Qwest alleges that EBTC has "threatened to 'begin blocking any traffic received from Qwest that is not properly identified as Qwest toll traffic' on August 16, 2004." (Complaint, ¶ 5.) The affected traffic would include calls that Qwest describes as "wireless transit traffic," that is, calls that originate with a wireless service provider and are delivered to Qwest for transport to other carriers and their end users. (Complaint, ¶ 1.) Qwest alleges that EBTC's threat to block the disputed traffic, if completed, would violate Iowa Code

§§ 476.20, 476.100(1), 476.100(3), 476.100(5), 476.101(9)"c," 477.5, 477.6, and 477.13 (2003), along with 199 IAC 22.5(13).

Qwest argues that EBTC's demand and threat to block traffic contravenes the Board's ruling in the "Proposed Decision and Order" issued in Re: Transit Traffic, Docket No. SPU-00-7, on November 26, 2001. Qwest also argues that the threat to block calls threatens the public interest. Qwest asserts that wireless service customers whose carrier uses Qwest's transit service to complete calls would be unable to call family, friends, police, or a doctor in EBTC's exchange in an emergency. (Complaint, ¶ 9.) (Calls to 911 emergency services would be unaffected because they are routed differently, but calls directly to emergency services like police, fire departments, or medical professionals in the EBTC service area would be blocked. Complaint, fn. 1, p. 4.)

On August 13, 2004, based solely on the allegations of the Complaint filed by Qwest, the Board found that EBTC intended to block certain telephone calls, commencing on Monday, August 16, 2004. The Board further found that such action by EBTC would create a danger to the public safety because "a wireless service subscriber whose carrier uses Qwest's transit service to complete calls would be unable to call family, friends, police, or a doctor in EBTC's exchange in an emergency." (Complaint, ¶ 9, footnote omitted.) Based on these (and other) findings, the Board issued a temporary injunction pursuant to Iowa Code § 17A.18A (2003), prohibiting EBTC from blocking the calls. Because the Board's findings were based solely on the allegations of Qwest's Complaint, and because EBTC had not

had an opportunity to respond to the allegations, the Board also found that its emergency adjudication should be temporary in nature and that each of the Board's findings, and the injunction itself, should be reconsidered by the Board after EBTC had an opportunity to respond to the Complaint and Qwest and any other interested persons have had an opportunity to reply. The Board allowed EBTC until August 20, 2004, to file its response to Qwest's Complaint and allowed Qwest four business days to file a reply to EBTC's response.

Also on August 13, 2004, U.S. Cellular Corporation (USCC) filed a complaint and request for emergency ruling complaining of the same EBTC actions, asserting that EBTC is trying to re-litigate questions the Board has already decided in the Transit Traffic case and seeking an order prohibiting blocking and summarily resolving the complaint against EBTC on the basis of Board precedent. USCC also seeks consolidation of its complaint (identified as Docket No. FCU-04-43) with the Qwest complaint (identified as Docket No. FCU-04-42).

On August 18, 2004, EBTC filed a response to the Board's temporary injunction and an answer to Qwest's complaint. The next day, EBTC filed a corrected response and answer, correcting a typographical error but making no substantive changes. EBTC provides additional background information and asserts that the temporary injunction should be lifted. In particular, EBTC alleges that its proposed blocking will pose no hazard to the public safety because 911 calls will be unaffected and EBTC will identify and complete calls to local police and fire departments and medical facilities. (Corrected Response, p. 4.)

In its response to the Board's temporary injunction, EBTC describes the manner in which it proposes to implement call blocking (by providing a recorded announcement to callers when a call is blocked that will inform the caller that "the call was not properly routed and to contact their originating carrier.") (Id.) EBTC then argues that the temporary injunction should be removed for a variety of reasons, including the fact that EBTC is not proposing to block any Qwest-originated traffic. EBTC effectively asserts that Qwest lacks standing to protest the proposed blocking of non-Qwest-originated traffic.

Further, EBTC asserts that Qwest's service will not be discontinued pursuant to Iowa Code § 476.20 because the calls in question are not delivered pursuant to a service offered by EBTC. Instead, EBTC asserts it is planning to block unauthorized calls delivered in an unauthorized manner, as permitted by 199 IAC 22.5(13)"g".

EBTC then asks that the Board hold an immediate hearing on its decision to issue a temporary injunction and "dissolve the injunction because no immediate danger to the public exists as a result of East Buchanan's actions." (Corrected Response at p. 5.)

On August 20, 2004, EBTC filed an answer to the USCC complaint, arguing (among other things) that if EBTC is permitted to block the disputed traffic, USCC's customers will only be unable to complete calls if USCC refuses to re-route its traffic. EBTC also resists consolidation of the two complaints because, it argues, the two cases are different. Qwest-originated traffic will not be blocked, so Qwest's complaint should be summarily dismissed, according to EBTC. USCC, in contrast, may

experience actual blocking or be forced to re-route its calls, making for a different case.

On August 23, 2004, USCC filed a reply to EBTC's response, supporting continuation of the temporary injunction.¹ USCC asserts that EBTC is improperly attempting to re-litigate the Board's Transit Traffic decision, which involved at least some of the same traffic and addressed intercarrier compensation issues. USCC argues that the maximum relief available to EBTC at this time is recognition that the authorization for this traffic is disputed and an appropriate proceeding should be conducted to resolve the dispute. (USCC Reply, p. 5.)

On August 24, 2004, Qwest filed a reply to EBTC's response. Qwest supports continuation of the temporary injunction, arguing there is no injury, irreparable or otherwise, that will result if the Board refuses to permit EBTC to unilaterally block the disputed traffic. (Qwest Reply, p. 2.) Qwest argues it has standing to protect its business relationships with the carriers that originate this traffic. Qwest further points out that EBTC has demanded that Qwest pay terminating access charges for the traffic in question, giving Qwest a direct financial interest in the matter. (Qwest Reply, p. 3.)

Qwest also argues that Iowa law does not permit EBTC to block the disputed calls. The rule relied upon by EBTC, and other, similar Board rules, all involve customer service, customer relationships, and network security, not intercarrier transactions. (Qwest Reply, pp. 6-7.) Finally, Qwest argues that EBTC cannot

¹ The reply was filed in both dockets.

prevent injury to the public welfare merely by permitting calls to medical, fire, and police facilities. Qwest argues that there are emergency calls that do not involve the specified facilities, ranging "from a stranded driver who needs a tow truck to a child calling home to tell her parents she'll be later than expected." (Qwest Reply, p. 8.) Qwest concludes that "EBTC cannot decide what traffic is important enough to except from its proposed blocking scheme. This is a tactic the Board cannot sanction." (Id.)

On September 3, 2004, EBTC filed a withdrawal of its request for an immediate hearing on the temporary injunction and a motion to dissolve the injunction. First, EBTC states that based upon the Qwest and USCC responses, there appears to be no fact issue requiring a hearing on the temporary injunction, so the request for hearing is withdrawn. (Withdrawal at p. 2.) EBTC asserts, however, that the temporary injunction should be dissolved, arguing that the complaints filed by Qwest and USCC relate to monetary issues, not emergencies or dangers to the public safety. (Id.) EBTC asserts that it has "merely decided not to accept unauthorized traffic" (Withdrawal, p. 4), that is, wireless-originated calls being delivered over Qwest long distance trunks to EBTC. EBTC disputes the claim that the issues in this proceeding were decided in Docket No. SPU-00-7, arguing that "[t]he issue of refusing to accept the traffic was not raised because independent local exchange carriers lacked the ability to refuse the traffic without also blocking Qwest's legitimate long-distance traffic." (Withdrawal, p. 5.)

Next, EBTC argues that Qwest and USCC have failed to show they will suffer substantial injury or damages in the absence of an injunction. EBTC admits that its actions "might create some inconvenience for its own customers, who might not receive some wireless to wireline traffic," but asserts that "[a]s a cooperative, East Buchanan is in the best position to weigh customer inconvenience against the cost to the company from the forced delivery of unauthorized traffic." (Withdrawal, p. 8.)

EBTC also argues that Qwest and USCC have failed to allege or demonstrate the absence of an adequate legal remedy, arguing that damages are an available remedy to either complainant. (Id.)

Finally, EBTC withdraws its resistance to consolidation of this complaint with the USCC complaint, Docket No. FCU-04-43.

Based on the findings the Board made in its order of August 13, 2004, the Board will deny EBTC's request to dissolve the temporary injunction. Without repeating the entirety of that order in this one, the Board continues to be concerned that the call blocking proposed by EBTC would result in the blocking of emergency calls that originate on a wireless carrier, such as the tow truck example offered by Qwest. EBTC attempts to dismiss Qwest's other example (a child calling home to tell her parents she will be later than expected) by arguing the child could simply use the school's land-line telephone. (EBTC Withdrawal, p. 3, fn. 2.) First, this response assumes the child is calling from a school and has ready access to a land-line phone, which may not be the case. Second, the response completely ignores Qwest's tow

truck example, a situation in which a land-line telephone alternative may not be readily available.

Thus, it appears that blocking telephone calls on a carrier basis will almost always present an immediate danger to the public health, safety, or welfare, because the blocking carrier cannot promise, let alone guarantee, that it will block only non-emergency calls. The carrier cannot even offer reliable assurances that most emergency calls will be completed; that would require a call-by-call real-time analysis that is not, on this record, a realistic possibility.

This does not mean carrier blocking is always prohibited,² but it does appear to support the idea that blocking should not be used as a means of forcing action in a commercial dispute. In this case, negotiations, complaint proceedings before the Board, arbitration (if available under federal law), and court cases, if necessary, all appear to be alternatives that will allow reasoned consideration of the disputed issues without causing unnecessary disruption of the public interest.

The bottom line is that emergency calls take all forms and can be directed to just about any telephone number. The only way to avoid blocking emergency calls is to avoid blocking. The Board continues to find that EBTC's proposed blocking involves an immediate danger to the public health, safety, or welfare, as described in

² Blocking may be appropriate, for example, if the actions of one carrier are causing significant and serious safety problems on another carrier's network, or if one carrier has been properly billed for services rendered by a second carrier, but the first carrier has refused to pay the bills and the result is a serious and immediate threat to the second carrier's financial health. In either of these circumstances (and there may be others, as well), the danger to the public health, safety, or welfare that would result from blocking is at least potentially offset by a danger that would result from not blocking. However, EBTC has not alleged the existence of any such immediate public danger in this matter, and it appears this is really nothing more than a commercial dispute that can be resolved through normal proceedings, without taking the extraordinary step of blocking.

Findings of Fact Nos. 2 and 3 in the Board's August 13, 2004, order. The temporary injunction will not be dissolved, but will instead continue until otherwise ordered by the Board.

The USCC motion to consolidate, which is now unopposed, will be granted.

An expedited procedural schedule will be established for the further conduct of this proceeding.

IT IS THEREFORE ORDERED:

1. The "Complaint for Emergency Injunctive Relief" filed on August 13, 2004, by Qwest Corporation is docketed for investigation pursuant to Iowa Code §§ 476.2, 476.3, 476.101(8) (2003), and such other provisions of law as may be relevant when the facts and arguments are developed. The matter is identified as Docket No. FCU-04-42.
2. The "Complaint and Request For Emergency Ruling" filed on August 13, 2004, by U.S. Cellular Corporation is docketed for investigation. The matter is identified as Docket No. FCU-04-43.
3. The motion to dissolve the Board's August 13, 2004, injunction, filed by East Buchanan Telephone Cooperative on September 3, 2004, is denied.
4. The unopposed motion to consolidate Docket Nos. FCU-04-42 and FCU-04-43 is granted.
5. The following procedural schedule is established for this proceeding:
 - a. Complainants shall file prepared direct testimony, with supporting exhibits and workpapers, on or before September 24, 2004.

b. Respondent shall file any rebuttal testimony, with supporting exhibits and workpapers, on or before October 6, 2004.

c. Complainants may file reply testimony, with supporting exhibits and workpapers, on or before October 13, 2004.

d. A hearing for the purpose of receiving testimony and cross-examination of all testimony will commence at 9 a.m. on October 27, 2004, in the Board's hearing room at 350 East Maple Street, Des Moines, Iowa. Parties shall appear at the hearing one-half hour prior to the time of hearing to mark exhibits. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at 515-281-5256 to request that appropriate arrangements be made. The Board has allotted a maximum of two days for this hearing.

e. Any party desiring to file a brief may do so on or before November 10, 2004.

f. Reply briefs may be filed on or before November 17, 2004.

6. In the absence of objection, all workpapers shall become a part of the evidentiary record at the time the related testimony and exhibits are entered in the record.

7. In the absence of objection, all data requests and responses referred to in oral testimony or cross-examination, which have not previously been filed with the Board, shall become a part of the evidentiary record. The party making

reference to the data request or response shall file an original and six copies at the earliest possible time.

8. In the absence of objection, if the Board calls for further evidence on any issue and that evidence is filed after the close of hearing, the evidentiary record shall be reopened and the evidence will become a part of the evidentiary record five days after filing. All evidence filed pursuant to this paragraph shall be filed no later than seven days after the close of hearing.

9. Pursuant to 199 IAC 7.7(2) and (11), the time for filing responses or objections to data requests and motions will be shortened to five days from the date the motion is filed or the data request is served. All data requests and motions should be served by facsimile transfer or by electronic mail, in addition to United States mail.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 14th day of September, 2004.